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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

AMERICAN BANKERS ASSOCIATION, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, AMERICAN COUNCIL OF LIFE INSURANCE, COMMERCIAL FINANCE ASSOCIATION, EQUIPMENT LEASING ASSOCIATION OF AMERICA,

Petitioners,

v.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

# BRIEF FOR RESPONDENTS IN OPPOSITION

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# QUESTIONS PRESENTED

## I

WHETHER THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA") IS EMPOWERED TO WRITE RULES DEFINING WHICH LENDING INSTITUTIONS ARE LIABLE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), 42 U.S.C. § 9601 ET SEQ.

## II

WHETHER EPA IS ENTITLED TO DEFERENCE WHEN PROMULGATING RULES DEFINING WHICH LENDING INSTITUTIONS ARE LIABLE UNDER CERCLA.

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## STATEMENT OF THE CASE

This case involves the authority of the United States Environmental Protection Agency ("EPA") to promulgate a rule, 40 C.F.R. §§ 300.1100 - 300.1105, which purports to define the circumstances under which lending institutions can be found liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. In the court below, petitions for review of the rule were filed by Michigan Attorney General Frank J. Kelley, the State of Michigan, the Michigan Department of Natural Resources (hereinafter collectively "Michigan"), and by Chemical Manufacturers Association ("CMA"). The EPA was named as Respondent in those petitions. Several associations representing lending institutions intervened. Those

petitions were granted and the rule was vacated. The Intervenors filed a Petition for Writ of Certiorari. EPA did not.

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), identifies broadly four classes of parties that are strictly, jointly, and severally liable for the cleanup of sites of environmental contamination: owners, operators, "arrangers," and transporters. Congress exempted from liability, however, those owners "who, without participating in the management of a vessel or facility, hold[] indicia of ownership primarily to protect [their] security interest in the vessel or facility." Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

In 1990, the United States Court of Appeals for the Eleventh Circuit noted

that a secured creditor was not exempt from liability pursuant to Section 101(20)(A) if it "participat[ed] in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), reh'g en banc denied, 911 F.2d 742 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991). After that decision, lenders sought congressional relief. Those efforts were not successful. Kelley v. EPA, 15 F.3d 1100, 1109 (D.C. Cir. 1994); Pet. App. 16a.[1] EPA, on the other hand, was more susceptible

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[1]Petitioners' Appendix will be referred to herein as "Pet. App." and Respondents' Appendix will be referred to herein as "Resp. App."

to pressure from the lending community. Despite advocating a narrower interpretation of the secured creditor exemption than adopted by the Eleventh Circuit, 901 F.2d at 1558, EPA began to craft a rule "re-interpreting" the secured creditor exemption in a manner favorable to the lending community.

EPA indicated that it was proposing the rule "under the authority of CERCLA

Sections 105[2] and 115"[3] and intended to utilize the rule as "guidance" for implementing Section 101(20)(A). 56 Fed. Reg. 28,799 (June 24, 1991). In its Brief in Response to Michigan's Petition for Review, EPA, through its lawyers at the Department of Justice,

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[2]Section 105, 42 U.S.C. § 9605, authorizes the President to promulgate the National Contingency Plan ("NCP"). Pet. App. 39a. The NCP provides "procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." 40 C.F.R. § 300.1.

[3]Section 115, 42 U.S.C. § 9615, provides the President with general rulemaking authority. Pet. App. 39a. As raised below by Respondents, Michigan's Petition for Review should also have been granted because the President never delegated authority to EPA to promulgate the lender liability rule. This issue was never directly addressed by the Court of Appeals. Presumably, the Court felt it unnecessary to reach this issue in light of the fact that it vacated the rule on other grounds.

for the first time attempted to buttress EPA's case by also relying on Section 106 of CERCLA as authority for promulgation of the rule. In pertinent part, Section 106 provides authority to EPA to issue administrative orders and provides a mechanism for an order recipient to seek reimbursement for an unlawfully issued order. 42 U.S.C. § 9606(a)-(b).

The Court of Appeals noted that although EPA's suggested interpretation of Section 105 was "imaginative," its arguments were "hardly persuasive." Kelley, 15 F.3d at 1106; Pet. App. 9a. After rejecting the authority that EPA had relied on as a basis for the rule, the Court of Appeals rejected the Department of Justice's argument that EPA's role in "implementing the reim-

bursement provisions of Section 106(b)(2) implies authority to define liability." 15 F.3d at 1106; Pet. App. 10a. The Court of Appeals relied on the fact that in Section 106(b)(2), Congress "quite consciously distinguished" between EPA's role in determining the appropriate cleanup (which is on the "administrative record" and thus entitled to deference) from EPA's view of whether or not a lender seeking reimbursement is liable (which is to be determined by courts based on the "preponderance of the evidence" and thus entitled to no deference). Id. at 1107; Pet. App. 12a.

The Court of Appeals also based its finding that Congress had not delegated rulemaking authority to EPA to promul-

gate the lender liability rule on the fact that CERCLA provides for private rights of action under Section 107 by persons, including Michigan, to recover cleanup costs without any involvement by EPA. Id. The Court of Appeals stated:

> Under these circumstances, it cannot be argued that Congress intended EPA, one of the many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants. Indeed, it was that very factor that led the Court in Adams Fruit v. Barrett, 494 U.S. 638, 650 (1990), to reject the Department of Labor's regulation as unauthorized. . . . Just so here. Congress, by providing private rights of action under Section 107, has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability. And Congress did so quite deliberately.

Id. at 1107-1108; Pet. App. 12a-13a.

The Court of Appeals also noted that EPA's "quasi-legislative effort" bore

"little resemblance" to an interpretive regulation, and that, in any event, "the same reason that prevents the agency from issuing the rule as a substantive regulation precludes judicial deference to EPA's offered 'interpretation.'" Id. at 1108; Pet. App. 14a. In sum, because Congress did not explicitly or implicitly delegate authority to EPA to decide for itself which lending institutions are liable, the Court of Appeals concluded that Congress intended Michigan's claims against lenders to be "evaluated by the federal courts independent of EPA's institutional view." Id. at 1109; Pet. App. 15a.

The Court of Appeals denied Petitioners' and EPA's Requests for Rehearing and issued a supplemental opinion.

Kelley v. EPA, 25 F.3d 1088 (D.C. Cir. 1994); Pet. App. 26a-35a. In that opinion, the Court of Appeals reaffirmed and clarified its earlier holding. The Court of Appeals noted that it had not held that Congress could not delegate substantive authority to EPA to define the contours of lender liability under CERCLA, only that Congress had not. Id. at 1092; Pet. App. 34a. The Court of Appeals also noted that its opinion was limited to whether a court must defer to EPA's interpretation of Section 101(20)(A).

> Here, it must be remembered, we are not dealing with section 107 which provides for judicial determination of liability. The terms which EPA wishes to define are not the general phrase owner or operator but the much more detailed language Congress fashioned in section 101(20)(A) to set forth the circumstances under which a lender would be held liable.

Id. at 1092; Pet. App. 35a.

Finally, the Court of Appeals noted that EPA and the Intervenors were not without options. They could again seek congressional relief. 15 F.3d at 1109; Pet. App. 16a. Also see 25 F.3d at 1092; Pet. App. 35a. They did just that. EPA and the lending community, however, were once again rebuffed by Congress. See Petition for Writ of Certiorari, p. 7, n. 2. Having been rebuffed twice by Congress, the Intervenors (here, the Petitioners) filed a Petition for Writ of Certiorari. EPA, on the other hand, did not.

## REASONS FOR DENYING THE WRIT

### I.

### THE OPINIONS AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA GRANTING MICHIGAN'S PETITION FOR REVIEW DO NOT CONFLICT WITH ANY DECISIONS OF OTHER FEDERAL APPELLATE COURTS AND THUS ARE UNWORTHY OF REVIEW.

The United States Court of Appeals for the District of Columbia is the only court that has reviewed EPA's authority to promulgate the lender liability rule. This is hardly surprising. Section 113(a) of CERCLA explicitly confines the review of any regulation promulgated pursuant to CERCLA to that court.

> Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to

> judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

42 U.S.C. § 9613(a). Indeed, because Section 113(a) bars courts other than the United States Court of Appeals for the District of Columbia from reviewing the lender liability rule, a conflict between circuits can never arise.[4] In sum, because the ruling of the lower

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[4]Rather than result in conflict, the lower court's ruling was recently relied on by the Eighth Circuit in Dico v. Diamond, ___ F.3d __ (8th Cir. September 12, 1994). Petitioners, nonetheless, suggest that their Writ should be granted because of an alleged conflict between Dico and Wagner Seed v. Bush, 946 F.2d 918 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992). See Petition for Writ of Certiorari, p. 13. Assuming arguendo a conflict does exist between those two cases, it is immaterial and, indeed, presumptuous. Only the parties to Dico may file a petition if they so desire based on any such conflict, not Petitioners in this case.

court neither conflicts with any other federal appellate court decision nor could it, the Petition fails to present an issue worthy of this Court's certiorari review.

II.

**THE PETITION PRESENTS NO VITAL OR IMPORTANT ISSUE OF FEDERAL LAW IN NEED OF THIS COURT'S AUTHORITATIVE VOICE.**

Although the issues raised in the Petition may be of importance to the Petitioners' pecuniary interests, the issues raised are not of vital national interest to the public. As noted above, Congress has twice been asked by the Petitioners to "reverse" Fleet Factors and provide their members with a "safe harbor." Yet, on each occasion, Congress has not been sufficiently moved by the anecdotal evidence of hardship to lenders to act.

As Michigan noted in its brief in the lower court, as of 1990, lenders comprised only 0.23% of all parties identified nationwide by EPA as potentially liable under CERCLA. Moreover,

> [O]nly 7 of the [40] lenders named as PRPs [potentially responsible parties] have paid any cleanup costs to EPA, and only 2 out of those 7 paid more than $8,100. The average costs paid by all 7 lenders was only about $96,000. This number stands in sharp contrast to the average cost of remedial action at a Superfund site, which EPA has recently estimated at $30 million.

Corrected Brief of Michigan Petitioners, p. 5 (quoting comments on the proposed rule submitted by the CMA) (emphasis in original). In light of these statistics, the Petitioners' self-serving contentions regarding the pernicious effect that the rule has had on the availability of credit do not serve as a proper basis for this Court's review.

Petitioners also suggest that a parade of horribles will descend upon EPA if the lower court opinion is left to stand because, in their words, "it would threaten EPA's rulemaking authority not only for CERCLA but for all environmental statutes...." Petition for Writ of Certiorari, p. 14. As an initial matter, and as noted above, the lower court was careful to limit its holding to whether EPA had the power to promulgate rules related to the lender exemption in Section 101(20)(A). See 25 F.3d at 1092; Pet. App. 34a-35a. The Court of Appeals holding, thus, does not bind EPA if it chooses to promulgate a rule pursuant to CERCLA on any other subject matter, let alone pursuant to other environmental statutes. The most telling evidence of the limited nature

of the Court of Appeals ruling is that EPA -- a party to the lower court proceeding -- decided not to file a petition in this Court.

At its core, the Petition presents nothing more than a policy dispute over the circumstances under which lending institutions should be held liable for sites of environmental contamination. This type of policy dispute is more appropriately addressed by Congress -- not the courts. Given the apparent lack of interest expressed by Congress in addressing an issue clearly within in its purview, the Petition simply does not rise to an issue of vital national importance in need of this Court's authoritative voice.

## III.

## EPA LACKS POWER TO WRITE RULES DEFINING THE CLASS OF LIABLE LENDERS UNDER CERCLA AND IS NOT ENTITLED TO DEFERENCE IN ITS INTERPRETATION OF 42 U.S.C. § 9601(20)(A).

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984), the Supreme Court indicated that, where Congress has delegated an agency interpretive authority, courts should accept any permissible interpretation put forth by the agency so long as Congress "has not directly addressed the precise question at issue...." Although Chevron involved an express grant of authority, the Court noted that "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." 467 U.S. at 844. Nonetheless, Chevron

requires some kind of delegation as a pre-condition to the deference. See Scalia, Judicial Deference to Administrative Interpretation of Law, 1989 Duke L.J. 511, 515-516 (1989); Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2084 (1990).

The Supreme Court recently shed new light on the circumstances under which an implicit delegation of interpretive authority may be found. Most notably, in Adams Fruit v. Barrett, 494 U.S. 638 (1990), the Court made clear that Chevron deference is only appropriate in situations where the agency at issue administers the specific portion of the statute it has interpreted. The Supreme Court in a unanimous opinion stated that:

> [E]ven if AWPA's [Migrant and Seasonal Agricultural Worker Protection Act] language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute. A precondition to deference under Chevron is a congressional delegation of administrative authority.... No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of § 1854 to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy.

494 U.S. at 649-650 (emphasis added). See also Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (a "specific responsibility for administering the law" is necessary

to trigger Chevron); Office of Professional Employees Int'l Union, Local 2 v. FDIC, 962 F.2d 63, 65 (D.C. Cir. 1992) (R.B. Ginsburg, J.).

The Adams Fruit Court went on to stress the distinction between grants of partial administrative authority under a statute and grants of such authority over the provision at issue:

> Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing AWPA's motor vehicle provisions. § 1841(d). This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction."

494 U.S. at 650 [quoting Federal Maritime Comm'n v. Seatrain Lines, Inc.,

411 U.S. 726, 745 (1973)] (emphasis in original).

This case is just like Adams Fruit. Although EPA has a number of administrative duties under CERCLA, which have been delegated to it by the President, EPA has not been delegated by either Congress or the President the authority to determine who is a liable lender under CERCLA. Congress has left that responsibility to the courts. See 42 U.S.C. § 9613(b).[5] Moreover, like the statute at issue in Adams Fruit, CERCLA provides a private right of action. 42

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[5]Section 113(b), 42 U.S.C. § 9613(b), provides that, except for review of regulations promulgated pursuant to CERCLA, "the United States district courts shall have exclusive original jurisdiction over all controversies" arising under CERCLA. See Resp. App. 7a.

U.S.C. § 9607(a); Resp. App. 4a-6a. Absent any explicit or implicit role in administering the lender liability scheme, EPA's attempt to "bootstrap" itself into this area must fail.

CERCLA's general grant of rulemaking authority is found in Section 115: "The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter." 42 U.S.C. § 9615. Petitioners suggest that Section 115 provides EPA with carte blanche to promulgate rules on any matter reasonably related to CERCLA. Petition for Writ, pp. 15-16. However sweeping the grant of authority is in Section 115, agency action can only be

sustained if the reviewing court is "reasonably ... able to conclude that the grant of authority contemplates the regulations issued." Chrysler Corp. v. Brown, 441 U.S. 281, 308 (1979). Also see Adams Fruit, supra (invalidating a regulation as beyond the scope of delegated authority despite Congress having granted authority in 29 U.S.C. § 1861 to the Labor Department to issue such rules "as are necessary to carry out this chapter"); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991) (Congress did not delegate administrative authority to the President to interpret all ambiguities in CERCLA). As set forth below, the text and structure of CERCLA, as well as its legislative history, suggest that Congress did not delegate rulemaking authority to the

President to promulgate the lender liability rule.

No explicit delegation of authority to define the class of liable lenders is found in CERCLA. This lack of explicit authority is in sharp contrast to specific delegations of rulemaking authority on other subjects. See e.g., 42 U.S.C. § 9605 (procedures governing the evaluation, selection, implementation, and completion of actions taken in response to sites of environmental contamination); § 9607(f)(2) (designation of natural resource trustees); § 9617(e) (technical assistance grants); and § 9651(f) (worker safety).

Nor does anything in CERCLA suggest that EPA has implicit authority to administer the class of liable lenders.

Indeed, all of the evidence is to the contrary. As then-Judge Breyer noted, Chevron is triggered only when courts can infer from the "language and circumstances" in a statute that Congress intended them to do so. Meadow Green-Wildcat Corp. v. Hathaway, 936 F.2d 601, 604-605 (1st Cir. 1991).

To begin with, Section 107(a) provides no special role for the President; the federal government is lumped together with states, Indian tribes, and other "person[s]" as just another potential plaintiff under the statute. 42 U.S.C. § 9607(a); Resp. App. 4a-5a. Moreover, Section 113(b) makes clear that it is the judiciary that is charged with interpreting the liability scheme. Resp. App. 7a. Additionally, while

Section 113(j)(2) provides that EPA's cleanup decisions are entitled to deference, the statute provides no similar treatment for EPA's decisions regarding the class of liable lenders. Resp. App. 8a. Also compare 42 U.S.C. § 9606(b)(2)(C) with 42 U.S.C. § 9606(b)(2)(D). Resp. App. 2a-3a.

This scheme was not created by accident. As several courts have noted, Congress intended for any ambiguities within CERCLA to be resolved by the federal courts through the development of appropriate federal common law. In the landmark case of United States v. Chem-Dyne Corp., 572 F. Supp. 802, 807 (S.D. Ohio 1983), for example, the court relied on the floor statements of the Senate and House sponsors in holding

that courts were to apply principles of federal common law in determining when to apply joint and several liability under the Act.

Congress further clarified its intent in 1986. It was through 1986 amendments to CERCLA that Congress enacted what is now Section 113(j)(2). Additionally, Congress specifically embraced the logic and result of the Chem-Dyne decision. See H. Rep. No. 99-253(I), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2856 ("courts" are given the authority "to establish the scope of liability" through "case-by-case application"). This theme is seconded in Section 113(f)(1), which provides that "[i]n resolving contribution claims, the court

may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." As explained in the legislative history: "As with joint and several liability issues, ... courts are to resolve such claims on a case-by-case basis, taking into account relevant equitable considerations." H. Rep. No. 99-253(I), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2862.

In line with this statutory structure and legislative history, courts consistently have determined that it is the judiciary's responsibility to fill in the unresolved interstices of the liability scheme. As stated by the United States Court of Appeals for the Fourth Circuit: "In each case, the

court must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially." United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) (emphasis added).

When ~~EPA~~ is involved in CERCLA actions in which the liability scheme is at issue, its capacity is invariably that of a plaintiff -- an enforcer of the liability scheme. As Justice Scalia has noted in a similar context, the Supreme Court has "never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." Crandon, 494 U.S. at 177 (1990) (Scalia, J., concurring). In that case, Justice Scalia noted the

compelling rationale that civil and criminal statutes are not "administered by any agency but by the courts." Id. It makes no difference that the interpretations here at issue are not case-specific. Indeed, Crandon involved a pre-existing "vast body of administrative interpretation...." 494 U.S. at 177 (emphasis in original). The point is that the provisions at issue in Crandon, relating to criminal enforcement, were not "administered by any agency but by the courts." Id. So it